Filed 5/17/10

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. YANG VANG, Defendant and Appellant.	C059700 (Super. Ct. No. 07F07938)

APPEAL from a judgment of the Superior Court of Sacramento County, Peter N. Mering, Judge. (Retired Judge of the Sacramento Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed as modified.

Hayes H. Gable III, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Robert K. Gezi and Ryan B. McCarroll, Deputy Attorneys General, for Plaintiff and Respondent.

---

* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts II, III, IV, and V of the Discussion.

A jury found defendant Yang Vang guilty of being a felon in possession of a firearm (Pen. Code, § 12021, subd. (a)(1)), a felon in possession of ammunition (Pen. Code, § 12316, subd. (b)(1)), possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), possessing methamphetamine while armed with a loaded, operable firearm (Health & Saf. Code, § 11370.1, subd. (a)), possession of codeine and thebaine (Health & Saf. Code, § 11350, subd. (a)), and possession of drug paraphernalia (Health & Saf. Code, § 11364). The court sentenced defendant to four years four months in prison.

On appeal, defendant contends: (1) his sentence for felon in possession of a firearm should have been stayed pursuant to Penal Code section 654; (2) there was insufficient evidence to support his conviction for possessing methamphetamine while armed with a loaded, operable firearm; (3) the court should not have informed the jury of the nature of his prior felony conviction; and (4) ineffective assistance of counsel. We modify the award of credits and affirm the judgment as modified.

FACTS AND PROCEEDINGS

On August 16, 2007, Sacramento police and probation officers conducted a probation search on defendant's home. When they arrived, they found defendant working on the car in the driveway. They searched him and found on him a glass pipe for smoking methamphetamine and $2,070 in cash.

In the house, officers found Nancy Thow, Xai Fang, and Sherrie Ly sitting on the couch with defendant's son. They

searched the house and found .56 grams of methamphetamine in one closet, 4.21 grams of codeine and thebaine in another closet, and two digital scales in one of the closets. The house had a surveillance camera on the front door, which could be viewed through a television monitor inside the house.

Officers went into a locked bedroom in the northwest corner of the house after obtaining a key from defendant. They found a loaded, operable .357 magnum revolver under a pillow on the bed and .357 caliber bullets in the bedroom closet.

Fang was interviewed by a detective after the search, and admitted buying $20 worth of methamphetamine from defendant that day, which she, Thow, and defendant smoked a few hours before the search. Testifying, Fang denied buying methamphetamine from defendant or telling the officer she had done so. The night before, defendant drove Fang and Thow so they could buy methamphetamine, which the three smoked that night.

The People submitted expert testimony that the methamphetamine was possessed for sale in light of the amount of drugs, the digital scales, the $2,070 cash in defendant's possession, and the surveillance system. The parties stipulated defendant had a 2005 felony conviction for possession of methamphetamine (Health & Saf. Code, § 11377).

Defendant testified and denied selling methamphetamine or possessing the drugs, gun, or ammunition. He did not have a bank account; the $2,070 in cash was from his son's disability benefits and his daughter, who worked. He had a surveillance

system because he lived in a high crime area and was afraid of break-ins.

DISCUSSION

I

Penal Code Section 654

The court sentenced defendant as follows: a three-year middle term for the principal count (possessing methamphetamine while armed with a loaded, operable firearm), with consecutive eight-month terms for felon in possession of a firearm and possession of codeine and thebaine. The court imposed consecutive sentences for possession of methamphetamine while armed and felon in possession of a firearm because defendant's "status as a felon, is a separate element in this case and adds to the seriousness of his offending." Appellant contends the court should have stayed its sentence for felon in possession of a firearm pursuant to Penal Code section 654 because it was inseparable from possession of methamphetamine while armed.

Penal Code section 654, subdivision (a) provides in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

The section precludes imposition of multiple punishments for conduct that violates more than one criminal statute but which constitutes an indivisible course of conduct. (*People v.*

Perez (1979) 23 Cal.3d 545, 551-552.) Penal Code section 654 serves to match a defendant's culpability with punishment. (*Id.* at p. 551.) Whether the provision "applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence. [Citation.]" (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143 (*Jones*).)

Defendant relies on *People v. Williams* (2009) 170 Cal.App.4th 587. In that case, police found a loaded firearm in the defendant's bedroom and another in a duffel bag containing methamphetamine that was found in the garage. (*Id.* at pp. 596-597.) The defendant was convicted of felon in possession of a firearm and possession of a controlled substance while armed. (*Id.* at p. 595.) The trial court imposed separate concurrent terms for both even though it found the two crimes involved the same act and intent. (*Id.* at p. 645.) The Court of Appeal reversed, holding the trial court's finding was supported by substantial evidence and therefore precluded the imposition of concurrent terms. (*Id.* at p. 646.)

Williams is readily distinguishable because the trial court here explicitly found the felon in possession of a firearm and possession of methamphetamine while armed offenses involved

separate intents. We must determine whether the court's finding is supported by substantial evidence. We conclude that it is.

In *Jones,* the court held section 654 did not preclude defendant's separate punishment for shooting at an inhabited dwelling (Pen. Code, § 246) and possession of a firearm by a convicted felon (Pen. Code, § 12021, subd. (a)(1)) because the defendant must have possessed the firearm before he drove to the victim's house and fired into it. (*Jones, supra*, 103 Cal.App.4th at pp. 1144, 1147.) In contrast, multiple punishment is improper where the evidence shows that, at most, "fortuitous circumstances put the firearm in the defendant's hand only at the instant of committing another offense" (*People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1412), such as where the defendant shoots an officer with the gun he wrested away from the officer moments before (*People v. Bradford* (1976) 17 Cal.3d 8, 13, 22-23), or where the shooting follows a struggle with the victim over a gun produced by the victim (*People v. Venegas* (1970) 10 Cal.App.3d 814, 818-821; see *Jones, supra*, 103 Cal.App.4th at p. 1144).

In *People v. Harrison* (1969) 1 Cal.App.3d 115 (*Harrison*), the defendant was doubly punished for violating Penal Code former section 12021 (now Pen. Code § 12021, subd. (a)(1)) (felon in possession of firearm), and Penal Code former section 12031, subdivision (a) (now Pen. Code, § 12031, subd. (a)(1)) [carrying a loaded firearm "in a vehicle . . . on any public street"]. (See also *Harrison, supra*, 1 Cal.App.3d at p. 118.) The appellate court upheld the sentence, reasoning: "The two

statutes strike at different things. One is the hazard of permitting ex-felons [*sic*] to have concealable firearms, loaded or unloaded; the risk to public safety derives from the type of person involved. The other strikes at the hazard arising when any person carries a loaded firearm in public. Here, the mere fact the weapon is loaded is hazardous, irrespective of the person (except those persons specifically exempted) carrying it." (*Id.* at p. 122.)

The Court of Appeal continued: "The 'intent or objective' underlying the criminal conduct is not single, but several, and thus does not meet another of the tests employed to determine if Penal Code section 654 is violated. [Citation.] For an ex-convict to carry a concealable firearm is one act. But loading involves separate activity, and while no evidence shows that appellant personally loaded the pistol, there seem little distinction between loading and permitting another to do so. Thus, two acts, not a single one, are necessarily involved and bring our case outside the prohibition against double punishment for a single act or omission." (*Harrison, supra*, 1 Cal.App.3d at p. 122.)

Defendant's possession of the firearm was not fortuitous, as he kept the loaded firearm under a bedroom pillow. Nor is the possession of the firearm offense inseparable from the crime of possession of methamphetamine while armed. Defendant testified that he lived in a high crime area and used the surveillance system because he was afraid of break-ins. The court could reasonably conclude that defendant possessed the

firearm to both conduct his drug business and to protect his home in a high crime area.

As in *Harrison*, the crimes of felon in possession of a firearm and possession of methamphetamine while armed address distinct dangers--that danger of felons possessing firearms, and the extra danger of mixing narcotics and loaded, accessible firearms. Also, possession of methamphetamine while armed requires the weapon to be loaded. (Health & Saf. Code, § 11370.1, subd. (a).) As in *Harrison*, this is a separate act from the mere possession of a firearm by a felon, placing the crimes outside of Penal Code section 654's prohibition against multiple punishment.

Since the offenses involve distinct dangers, separate acts, and separate intents, substantial evidence supports the court's conclusion that a felon in possession of a firearm was a separate offense from possession of methamphetamine while armed.

II

Sufficiency of the Evidence

Health and Safety Code section 11370.1, subdivision (a) makes it a felony for any person to possess methamphetamine or other controlled substances "while armed with a loaded, operable firearm." The statute defines "armed with" as "having available for immediate offensive or defensive use." (*Ibid.*) Defendant claims there was insufficient evidence to support his conviction for possession of methamphetamine while armed because the handgun was found under his bedroom pillow, and thus not available for his immediate use. We disagree.

"In reviewing the sufficiency of the evidence, we 'draw all inferences in support of the verdict that reasonably can be deduced and must uphold the judgment if, after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt.' [Citation.]" (*People v. Singh* (2004) 119 Cal.App.4th 905, 911 (*Singh*).)

Defendant claims Health and Safety Code section 11370.1 is analogous to section 11550, subdivision (e), which authorizes an enhancement for a person under the influence of a controlled substance "while in the 'immediate personal possession' of a loaded, operable firearm." In *People v. Pena* (1999) 74 Cal.App.4th 1078 (*Pena*), the defendant argued that the Legislature limited this enhancement to situations where the weapon is "available without any intervening conduct." (*Id.* at p. 1086.) The Court of Appeal found this was a "close call." (*Id.* at p. 1087.) Defendant's interpretation was "reasonable," as it was consistent with the measure's legislative history. (*Ibid.*) However, Health and Safety Code section 11550, subdivision (e) was intended to protect public safety by deterring others from possessing firearms while under the influence, a function fostered "by construing such statutes broadly." (*Pena,* at p. 1087.) Applying the rule that a penal statute capable of two constructions is construed in the defendant's favor, the Court of Appeal accepted the defendant's claim and held that "'immediate personal possession,' as used in [Health and Safety Code] section 11550(e), when applied to a

vehicle's occupant, requires that the firearm be within the passenger compartment." (*Pena*, at p. 1088.)

Defendant asks us to apply the reasoning in *Pena* and limit Health and Safety Code section 11370.1 to situations where the firearm was "nearby, quickly or directly available" to the accused. Since the firearm was under his bedroom pillow and he was arrested in the driveway, defendant argues he cannot be convicted under any reasonable interpretation of the evidence.

Health and Safety Code sections 11370.1 and 11550 were enacted together as parts of a bill "introduced at the request of the San Diego County Sheriff to address '"a current deficiency in California law. It is not broad enough, direct enough or tough enough to deter and stop the growing menace from a very deadly combination--illegal drugs and firearms."'" (*Pena*, *supra*, 74 Cal.App.4th at p. 1082, quoting Assem. Com. on Public Safety, Rep. on Sen. Bill No. 407 (1989-1990 Reg. Sess.) as amended July 10, 1989, p. 2).) Section 11550 originally applied to simple possession of a firearm while under the influence, but after legislators "voiced concerns about the scope of such a provision" (*Pena*, at pp. 1082-1083) it was amended to limit its scope to firearms in a person's "immediate personal possession." (*Pena*, at p. 1083.)

Health and Safety Code section 11370.1 presents a different history. Like Health and Safety Code section 11550, section 11370.1 was originally enacted with the same "immediate personal possession" language. (*Pena*, *supra*, 74 Cal.App.4th at p. 1083.) However, this language was subsequently removed by the

Legislature and replaced with the current language, "'while armed with' a loaded, operable firearm." (*Ibid.*)

We find the different legislative histories of Health and Safety Code sections 11370.1 and 11550 distinguishes *Pena.* The Legislature's decision to insert the narrowing phrase "immediate personal possession" was critical to the Court of Appeal's interpretation of section 11550 in *Pena*. (*Pena, supra*, 74 Cal.App.4th at p. 1087.) Since the same language in section 11370.1 was subsequently removed by the Legislature, *Pena's* interpretation of section 11550 is inapposite.

Health and Safety Code section 11370.1 "does not criminalize traditionally lawful conduct, but simply provides a more severe penalty for the unlawful possession of certain controlled substances by a person who is also armed with a loaded and operable firearm." (*People v. Heath* (2005) 134 Cal.App.4th 490, 497.) There is a common intent behind the "drug offense weapon enhancement statutes: to foster public safety and protect law enforcement officers by deterring drug users from possessing loaded, operable firearms while they are under the influence of street drugs. Deterrence is fostered by construing such statutes broadly. [Citation.]" (*Pena, supra*, 74 Cal.App.4th at p. 1087.)

Rather than applying *Pena*, we find guidance in the California Supreme Court's interpretation of similar statutory language. Penal Code section 12022, subdivision (a)(1), provides an enhancement for anyone "armed with a firearm in the commission" of a felony. In *People v. Bland* (1995) 10 Cal.4th

991 (*Bland*), our Supreme Court held a defendant is subject to this enhancement when he possesses both drugs and guns and keeps them together, but is not present when the police seize them from his house. (*Id.* at p. 995.) As with Health and Safety Code section 11370.1, a person is armed under Penal Code section 12022 if he "has the specified weapon available for use, either offensively or defensively. [Citation.]" (*Bland,* at p. 997.) This does not require that the defendant "utilize a firearm or even carry one on the body." (*Ibid.*) Instead, "the defendant need only have a weapon available for use to further the commission of the underlying felony." (*Id.* at p. 999.) Drug possession is a "'continuing' offense" which renders him liable "throughout the entire time the defendant asserts dominion and control over illegal drugs." (*Ibid.*) Therefore, "when, at any time during the commission of the felony drug possession, the defendant can resort to a firearm to further that offense, the defendant satisfies the statutory language of being 'armed with a firearm in the commission . . . of a felony.' [Citation.]" (*Ibid.*)

Since *Bland* interpreted very similar statutory language, we apply its reasoning to Health and Safety Code section 11370.1. The evidence shows defendant kept the drugs at his house, and he intended to protect the items in his home from break-ins. The gun was under the pillow in his bedroom, so defendant could resort to it to further his offense of possession of methamphetamine by protecting the drugs from a home invasion robbery. The jury could readily infer this from the evidence

presented, and we accordingly conclude that substantial evidence supports defendant's conviction.

III

Defendant's Prior Conviction

Both parties stipulated that defendant was convicted in 2005 of possession of methamphetamine. Defendant argues it was improper to refer to his prior felony conviction without sanitizing the reference to the underlying offense, possession of methamphetamine. Recognizing the stipulation forfeits his claim (Evid. Code, § 353, subd. (a)), defendant argues counsel was ineffective in failing to delete the reference to the nature of his prior conviction.

"To prevail on a claim of ineffective assistance of counsel, a defendant '"must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice."' [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 389 (*Maury*).)

As defendant was charged with felon in possession of a firearm, his status as a previously convicted felon was clearly relevant. If "defendant will stipulate to ex-felon [*sic*] status, evidence of the *nature* of his prior convictions still may and should be withheld from the jury, since such evidence is irrelevant to the ex-felon [*sic*] issue." (*People v. Valentine* (1986) 42 Cal.3d 170, 173.) However, this rule does not prohibit the nature of the conviction from being disclosed if relevant to some other issue in the case. (*People v. Karis* (1988) 46 Cal.3d 612, 639, fn. 18.)

"While evidence of other crimes is inadmissible when offered to prove criminal disposition or the propensity of the accused to commit a particular crime [citation], such evidence is admissible when offered to prove such issues as motive, opportunity, intent, common design and plan, knowledge or identity. (Evid. Code, § 1101, subd. (b) . . . .)" (*People v. Perez* (1974) 42 Cal.App.3d 760, 763-764.) "An essential element of the crime of possession of narcotics is knowledge of the narcotic character of the article possessed [citation] and evidence of prior use of narcotics . . . is admissible for such purpose." (*People v. Hancock* (1957) 156 Cal.App.2d 305, 312; see also *People v. Pijal* (1973) 33 Cal.App.3d 682, 691 [prior narcotics conviction admissible to prove knowledge].)

To be admissible, such evidence must have substantial probative value that is not outweighed by its potential for undue prejudice. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1123.) Evidence is unduly prejudicial under Evidence Code section 352 if it tends to evoke an emotional bias against the defendant without regard to any issue in the case, not simply that it is damaging evidence. (*People v. Crew* (2003) 31 Cal.4th 822, 842.)

The prior possession of methamphetamine conviction was relevant to prove defendant knew the substance found in the closet was methamphetamine. This evidence would not provoke an emotional bias against defendant, and was not foreclosed under Evidence Code section 352.

Counsel is not ineffective for failing to make futile or unmeritorious objections. (*People v. Memro* (1995) 11 Cal.4th 786, 834.) Since the nature of defendant's prior conviction was admissible, defense counsel did not render ineffective assistance in agreeing to the stipulation.

IV

Reference to the Probation Search

Defense counsel did not object to testimony that the officers were conducting a probation search of defendant's residence. Defendant claims trial counsel was ineffective by not objecting to the reference to his probationary status. We disagree.

In order to prove ineffective assistance of counsel, "prejudice must be affirmatively proved; the record must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" (*Maury, supra,* 30 Cal.4th at p. 389, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 694 [80 L.Ed.2d 674, 698].)

We do not think that trial counsel erred. In any event, defendant was not prejudiced by counsel's failure to object to the reference to defendant being on probation. Defendant's prior felony conviction for possession of methamphetamine was properly admitted through a stipulation. In light of this and the overwhelming evidence of defendant's guilt, it is not reasonably probable that a different result would have been

reached had there been no reference to defendant being on probation at the time of the search.

V

Conduct Credits

Pursuant to this court's miscellaneous order No. 2010-002, filed March 16, 2010, we deem defendant to have raised the issue (without additional briefing) of whether amendments to Penal Code section 4019, effective January 25, 2010, apply retroactively to his pending appeal and entitle him to additional presentence credits. We conclude that the amendments do apply to all appeals pending as of January 25, 2010. (See *In re Estrada* (1965) 63 Cal.2d 740, 745 [amendment to statute lessening punishment for crime applies "to acts committed before its passage provided the judgment convicting the defendant of the act is not final"]; *People v. Hunter* (1977) 68 Cal.App.3d 389, 393 [applying the rule of *Estrada* to amendment allowing award of custody credits]; *People v. Doganiere* (1978) 86 Cal.App.3d 237 [applying *Estrada* to amendment involving conduct credits].) Defendant is not among the prisoners excepted from the additional accrual of credit. (Pen Code, § 4019, subds. (b)(2) & (c)(2); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.) Consequently, defendant having served 214 days of presentence custody, is entitled to 214 days of conduct credits.

DISPOSITION

The judgment is modified to award defendant 214 days' conduct credit for a total of 428 days' presentence credit. As

modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract reflecting the change in credits and forward a copy to the Department of Corrections and Rehabilitation.

HULL, J.

We concur:

BLEASE, Acting P. J.

SIMS, J.